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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-803

MIKE YATZOR,

Petitioner,

vs.

HERBERT ALLEN, GLENN SHIELDS, RAY SHOWMAN, all individually and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA, RAY SANDERS, JOSEPH HECKER, and ROBERT TRACY, individually, and as Supervisors of WASHINGTON TOWNSHIP, ERIE COUNTY, PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

I. C. BLOOM, ESQUIRE,
200 Washington Trust Building,
Washington, Pennsylvania 15301,

JEROME HAHN, ESQUIRE,
247 Washington Trust Building,
Washington, Pennsylvania 15301,

Attorneys for Petitioner.

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PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

We believe the Arguments presented in our Petition are fully dispositive of the issues. However, since Respondents' Brief misquotes some material facts in the Record and Petition and there is a new decision of the Court decided January 22, 1975, which is most applicable, this Reply Brief is filed.

1. PETITIONER DID RAISE AN ISSUE AS TO THE CONSTITUTIONALITY OF THE PENNSYLVANIA POLICE TENURE ACT IN ALL THE PROCEEDINGS IN THE PENNSYLVANIA COURTS, AND IS ENTITLED TO REVIEW THEREOF NOW.

A. The Federal remedy under the Civil Rights Acts is supplementary to the State remedy, and there is no need to first exhaust State remedy.

Directly contrary to the statement at page 7 and 8 of Respondent's Brief, Petitioner did raise an issue as to the constitutionality of the Pennsylvania Police Tenure Act in the proceedings in the Common Pleas Court of Erie County, and on Appeal to the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court. This was alleged in Opposing Affidavits to Respondents' Motion in Federal Court, which were filed of Record by Affidavit of Joseph M. Walsh, Jr., Esquire of Erie County, who represented Petitioner then, and in Opposition Affidavit of Louis Vaira, Esquire, who represented Petitioner in all his Appeals before the Commonwealth Court and Supreme Court of Pennsylvania, (R 153, 154; R 148-152, C.C.A. Record). The Affidavits show it was raised that it would be violative of due process under the State and Federal Constitutions for Petitioner not to be given written reasons and a Hearing thereon.

The Federal remedy is supplementary to the State remedy and the latter need not be first sought and refused before the Federal one is invoked; *Monroe v. Pape,* (1961) 365 U. S. 167, 5L. Ed. 2d 492. The Court said there 42 U. S. C. 1983 protects a right guaranteed by the Fourteenth Amendment, as well as more directly created Federal rights. Free speech has been protected thereunder. Monroe held 42 U. S. C. 1983 overrides certain kinds of state law; provides a remedy where a state law is inadequate; provides a federal remedy although a state remedy adequate in theory is not available in practice. Also, the Court's decisions have established that a plaintiff in an action under the Civil Rights Act, 42 U. S. C. Sec. 1983, is not required to exhaust state administrative remedies where the constitutional challenges is sufficiently substantial to require the convening of a three-judge court; *King v. Smith* (1968) 392 U. S. 309, 20 L. Ed. 2d 1118, 88 S. Ct. 2128.

Of course, in Plaintiff's Complaint in the Federal District Court as stated throughout the Petition, Petitioner is contesting the constitutionality of the Pennsylvania Police Ten-

ure Act and/or its application to him and the circumstances of the case. Further, he has contended that it would be denial of due process of law not to afford him written charges and an opportunity to be heard. In short, both in the State Courts and in the instant proceeding in the Federal Court, these constitutional questions have been raised. Petitioner is entitled to review thereof now.

2. A MOST RECENT DECISION OF THIS COURT AND OTHER DECISIONS SHOW THE THIRD CIRCUIT DECIDED THE MATTER IN CONFLICT THEREWITH, DECIDING IMPORTANT FEDERAL QUESTIONS.

A. In *Goss v. Lopez, et al.*, decided January 22, 1975, No. 73-898, the Court held that high school students suspended for misconduct for up to ten days were denied due process of law for being suspended without hearing prior to suspension or within a reasonable time thereafter. The majority opinion said, "Accordingly, a State employee who under State law, or rules promulgated by state officials, *has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge, may demand the procedural protection of due process.*" (emphasis supplied) (Page 7, Slip Opinion) The Court cites *Arnett v. Kennedy*, 416 U. S. 134 (1974) and *Goldberg vs. Kelly*, 397 U. S. 254 (1970), which were mentioned in the Petition at pages 11 through 13. The decision in *Goss* (Supra) and cases cited therein and their principles forcefully applies to the case at bar. At page 13, this Court further cited *Mullane v. Central Hanover Bank and Trust Company*, 339 U. S. 306, that due process requires notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective. Petitioner mentions the Mullane case (Supra) in citing *Bell vs. Burson*, 402 U. S. 535 (1971) at page 11 of its Petition.

On page 6 under C., Respondent misquotes that "Peti-

tioner admits on page 12 of the Petition that this case involves a state statute only." The Petition, particularly pages 10 through 15, show that both the Argument and cases cited, for the most part, have to do with other cases wherein state statutes and procedures were declared by this Court to be unconstitutional or to deny constitutional rights by the way they were applied to given fact situations. Plaintiff's Complaint and all the affidavits in Opposition to the Motion filed in the District Court clearly allege violations of Petitioner's rights under the Constitution, both State and Federal, squarely in accord with these cases and *Perry v. Sinderman*, 480 U. S. 593 (1972).

In *Glus v. Brooklyn Eastern District Terminal*, 359 U. S. 231, 3 L. Ed. 2d 770 (1959), this Court unanimously reversed the Court of Appeals which affirmed District Court's dismissing the action on the basis that the defense of estoppel was not available against the statute of limitations contained in the Federal Employers Liability Act. This Court held it was error for the trial court to dismiss the action and decide the question of estoppel and that *whether Plaintiff could in fact make out a case calling for application of the doctrine of estoppel must await trial.* This Court said, "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar an inequitable reliance on statutes of limitations." at 232-233.

Throughout his Petition, Petitioner has set forth that he never was given express oral or written notice that he would not be given written reasons and a hearing thereon. At the most, for the first time, when the Township Solicitor's Opinion was approved at a meeting on April 6, 1968, he first learned that by inference the Supervisors thought they could let him go without any reasons (page 6, Petition). The Petition argues that the Appeals Court also decided important

State questions in direct conflict with applicable state law and state decisions, (Petition pp. 18 through 26). Petitioner pointed out that because of "estoppel" or "fraudulent concealment of the accrual of the right of action," or lack of termination of his employment in a legally effective way, the state of limitations would not begin to run until April 6, 1968 at the very earliest. (Petition page 24).

Respondent has misquoted Petitioner's Petition at page 3, in stating "Petitioner concludes that August 3, 1967, the date Petitioner filed a Petition for Appeal in the Erie County Court of Common Pleas, is the pertinent date for purposes of computing the six-year statute of limitations. (Petition, page 15)" At page 15 of the Petition, it states, "*If* Plaintiff's right of action accrued as of the time 'Plaintiff realized' that the Court found, to-wit, on August 3, 1967, his instant action wouldn't be barred because it was filed on July 6, 1973 within six years of August 3, 1967." (See also Pet. 22) Further the Complaint and Opposition affidavits and Petition show, if believed at Trial, that in reprisal for exercise of his right of free speech about better law enforcement and government, Petitioner was prevented under color of State law, from his expectancy of continued public employment by Respondent's actions.

In brief, aside from claiming that there was no notice to Petitioner that he would not be given reasons and a hearing, and there was lack of notice of any reasons for discharge and a hearing thereon, also, any purported notice to Petitioner before April 6, 1968 meeting of the Township Supervisors would be lack of constitutionally valid notice, which would preclude the running of the Statute of Limitations. See *Shroeder v. City of New York*, 371 U. S. 208 (1962), wherein the Court held that the alleged "notice" of diversion of waters of the Neversink River, did not measure up to the quality of notice which due process of the Fourteenth Amendment requires. Verily, there are substantial Federal Questions.

3. THERE ARE OTHER MISQUOTATIONS OF THE RECORD AND THE PROCEEDINGS WHICH FURTHER EVIDENCE THERE IS A GENUINE ISSUE OF MANY MATERIAL FACTS, LET ALONE OF ANY MATERIAL FACT WHICH CAN'T BE DECIDED ON MOTION FOR SUMMARY JUDGMENT BUT ONLY AFTER TRIAL.

Page 1 of Respondents' Brief states, in the second sentence, "At the first meeting of each calendar year commencing in January, 1963, Yatzor's employment was continued for each such calendar year by the Township Supervisors until the year 1967." This statement of fact is directly contrary to the allegations of Plaintiff's Complaint in Federal Court, and to his Affidavit and Supplemental Affidavit, filed in opposition to Respondents' Motion for Summary Judgment in the District Court (C.C.A.R. 1-18; pp. 134-147; pp. 208-221). In your Petitioner's Statement of Fact at pp. 4 and 5, it sets forth that Petitioner was hired for an *indefinite term of employment* on April 7, 1962, and there was no yearly motion to continue him in employment, except in January, 1965, his compensation was changed from an hourly rate, to $100.00 a month, as has been the custom and practice of the Supervisors to continue all employees in their positions from year to year without formal vote, so he had an expectancy of continued employment. As Respondent appears to be denying this indefinite term of employment, this is a genuine issue as to a material fact, even as regards to the applicability of the defense of the Statute of Limitations, under this Court's own decisions, viz. *Glus v. Brooklyn Eastern District Terminal*, (Supra), *Perry v. Sinderman* (Supra), *Goss v. Lopez* (Supra), and other cases cited by Petitioner, including the Pennsylvania cases on continuing contract of employment, continuing cause of action, estoppel and fraudulent concealment of the accrual of the right of action, all covered before in his Petition. It should be noted here that on page 6 of the Petition, at the

bottom, the Township Solicitor's Opinion is quoted: "This is definitely a hiring at will, as there was no specific period of time for which he was hired . . . ," copy of which Opinion was attached to an Opposition Affidavit of Petitioner in District Court.

Two other genuine issues as to material facts are as to the particular act or acts that created or caused the accrual of Plaintiff's cause of action and when did this occur. On page 5 of Respondents' Brief it claims that Petitioner's *discharge* on January 7, 1967 was "the overt act" which created the cause of action, saying: "Neither does it appear there is a genuine issue of material fact," as to that. This is denied and contested by Petitioner throughout his Petition and in the Record in the Court Below. Respondents admit at page 4 of its brief, "The only genuine issue as to a material fact which existed with regard to the applicability of the defense of the Statute of Limitations was a determination of the *last date on which an overt act* injuring Petitioner had been committed by Respondent." (emphasis supplied) It should be noted here that the expression "overt act" applies to actions based on conspiracy. Although Plaintiff's Complaint in Action was based partly on alleged conspiracy of two of the Defendants, it was much broader than that, and was not based solely and entirely on conspiracy. As was stated in the *Monroe vs. Pape* case (Supra), there is no requirement that defendant's action be wilful in order to hold him liable under 42 U. S. C. 1983; that case stated a person is "responsible for the natural consequences of his actions," (Supra) 365 U. S. at 187.

It was further pointed out in the Petition, pp. 19-26, that the alleged "discharge" or termination of Petitioner's employment was not done in a legally effective way under Pennsylvania law, in the sense of being done by a motion, ordinance or resolution, as required thereby. Therefore, at the earliest, there was no official action of the Township until April 6, 1968 meeting at which the Solicitor's Opinion

was approved. Even by Affidavit of Plaintiff to which a copy of the minutes of that meeting are attached, it shows that there was no official motion, ordinance or resolution discharging or suspending Petitioner at that meeting. Petitioner's Opposition Affidavits filed in the Court Below also have attached copies of Minutes of other meetings prior to this April 6, 1968 meeting, which clearly show there was no such official and definite action of the Township before April 6, 1968, which would have given accrual and given rise to Plaintiff's right of action before. For example, at the January 6, 1968 meeting, the Minutes state: "There was an informal discussion on the police situation by the Board and the visitors and it was decided to wait until the Board had a Solicitor to help decide what should be done." (CCA. 214, 215) Petitioner attended the meeting of February 3, 1968, requesting that he either be given a hearing or be permitted to continue his duties as Chief of Police. The Minutes of that meeting stated: "Mr. Toohey was given information concerning Mr. Yatzor's complaint and would get in touch with Mr. Yatzor's attorney to try and settle this dispute." (CCA. 216, 217)

The Pennsylvania statute in question sets forth: "If the Person sought to be suspended or removed shall demand a public hearing, the demand shall be made to the appointing authority." (App. D. 10a, 11a) In short, a policeman has to first make a demand for public hearing *after* a written statement of any charges have been furnished him. *After written charges* and a *demand for public hearing, and then a refusal,* only then does his right of action accrue under this particular statute. Petitioner's counsel, by letter dated March 23, 1967, requested written notice of any charges and a hearing thereon. By the Supervisors approving the Solicitor's Opinion at the April 6, 1968 meeting, which stated that this was a hiring at will, and "under the law his services may be terminated at any time and for any reason," this perhaps constituted *a refusal* which caused Plaintiff's right

of action to ripen at that time, at the very earliest. Even if there were no "estoppel" or "fraudulent concealment of the cause of action or the accrual of the cause of action," before or after that time (which Petitioner claims) still his Federal suit filed on July 6, 1973, which was still well within the six-year statute of limitations.

In *Mangan v. McNair*, 321 Pa. 446, 184 Atl. 668 (1936), the Court said that under 46 Purdons Statutes 156, where a statute creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement, such remedy is exclusive and must be strictly pursued. The Court held in that case that the appeal there to the Courts *before the final order* of the Civil Service Commission was *premature*. The Court said at pp. 448, 449: "The Commission has jurisdiction of the case. *After it is disposed of there,* the Courts may give such assistance as the law provides . . ." (emphasis supplied)

Petitioner filing a Petition for Appeal to the Erie County Pennsylvania Court on August 3, 1967 was merely a precautionary measure as there had been no final action of the Supervisors denying him reasons and a hearing. Also, the Record in Federal Court shows that Respondents' Answer to this Petition was not filed in the State Court until May 16, 1969, which corroborates the claim of "estoppel" and "fraudulent concealment of the accrual of the right of action." The Court will recall in the Petition it sets forth the promises between March, 1967 to the April 6, 1968 meeting made to Petitioner that he would be restored to his position without the necessity of litigation and to hold off legal proceedings. (Pet. 6, 7) In short, there was even "waiver" of the defense of the Statute of Limitations during this period of time by Respondents which waiver applies to the Respondents now trying to raise the Statute of Limitations defense. The Police Tenure Act does not set forth the period of time within which the "suspended or dismissed police"

may appeal to the Common Pleas Court of the County. (App. 11a)

In *Vega Appeal*, 383 Pa. 44, 117 Atl. 2d. 736, 1955, the Court held in the absence of any specific provisions for appeal time it couldn't be said that a time less than sixty days is unreasonable in which to file such an appeal especially in view of the fact that the Pennsylvania statute in 53 P. S. 53271 allows a sixty-day period *after final order*. (App. 17a, 18a) In brief, if Petitioner only had sixty days to file his Petition for Appeal in the Erie County Pennsylvania Court from the date of January 7, 1967, which Respondent claims is the date his cause of action arose, because he filed his Petition August 3, 1967 and Defendants did not raise this time of filing as being too late, they must have deemed to have waived the defense of the Statute of Limitations at least as to that period of time. However, there was no *final action* at that time.

Respondents did not record any official action that was legally effective to "discharge, suspend, or remove" Petitioner as Police Chief. The only action that comes closest to official action would be at the meeting of April 6, 1968. If matters of local government could be legislated without any record of it in the Minutes of that local government, the law of the jungle would be the law of local government. In *Rush v. Butler Fair and Agricultural Association*, 391 Pa. 181, 137A 2d. 245 (1958), the Pennsylvania Supreme Court reversed the dismissal of a Bill in Equity on Preliminary Objections of alleged Laches, and said that this question can only be decided at the trial. The Court said at 391 Pa. 185, 186: "The fraud alleged was not the concealment of the renewal of the lease from the shareholders, but rather the sale of the assets of the corporation by the directors and officers at a grossly inadequate price. Acts of concealment independent and additional to this fraud were alleged, *viz. the failure to record the renewal lease, and the omission to enter*

the authorization of the new lease in the Minute Book of the Board of Directors. These acts are sufficient to constitute fraudulent concealment such as would toll the running of the statute. Bailey v. Jacobs, 325 Pa. 187, 189 Atl. 320 (1937) (*failure to enter* upon company books fraudulent withdrawal of corporate funds); *Lutherland, Inc. v. Dahlen*, 357 Pa. 143, 53 A. 2d 143 (1947) (*failure to record* unlawful issuance of stock and leases)." (Emphasis supplied) If the Supervisors decided not to give reasons and a hearing to Petitioner before the April 6, 1968 meeting, they did not record this on any of their minutes of meetings held prior thereto. Respondents did not produce any such minutes. Therefore, this was such "fraudulent concealment such as would toll the running of the Statute," as in the Rush case (Supra) and other cited cases. Thus, there is a genuine issue of many disputed material facts that the Lower Courts should not have decided on Summary Judgment, but should be decided at Trial.

Conclusion

For the reasons set forth in the Petition and this Reply Brief, a Writ of Certiorari should be granted.

Respectfully submitted,

I. C. BLOOM, Esquire,
200 Washington Trust Building
Washington, Pennsylvania 15301

and

JEROME HAHN, Esquire,
247 Washington Trust Building
Washington, Pennsylvania 15301

Attorneys for Petitioner

CERTIORARI DENIED